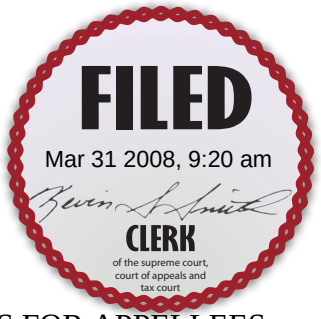

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IN THE
COURT OF APPEALS OF INDIANA

BRENDA OTTINGER and JOSEPH OTTINGER,	)	
Appellants-Defendants,	)	
vs.	)	No. 29A02-0706-CV-513
PATRICIA SAWYER and ASHWOOD I HOMEOWNERS' ASSOCIATION,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0506-PL-714

March 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Displeased with a fence built by Brenda and Joseph Ottinger, Patricia Sawyer sued to enforce the Covenants of Ashwood I Subdivision. The Ottingers filed a third party complaint against the Ashwood Homeowners' Association ("Association"), alleging they had detrimentally relied on a voicemail message from an Association board member when they built the fence. The trial court ordered the Ottingers to reconstruct their fence and pay Sawyer's attorney fees, and it found the Association was not liable to the Ottingers. We conclude the Ottingers violated the Covenants and did not demonstrate that the voicemail estopped the Association from enforcing the covenants. However, the award of attorney fees to Sawyer is not supported by the record; therefore, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

The Ottingers and Sawyer are next door neighbors who live in the Ashwood Subdivision. Ashwood is governed by a "Declaration of Covenants, Conditions, and Restrictions." (Appellants' App. at 258) (hereinafter "Covenants"). The Covenants contain architectural controls, which provide in pertinent part:

> No . . . fences . . . shall be . . . erected . . . until the written plans and specifications showing in reasonable detail the nature, kind, shape, height, materials (including color), location and approximate cost of same shall have been submitted to and approved in writing . . . by an Architectural Committee. . . .

(*Id*. at 272.)

On April 28, 2004, the Ottingers submitted a written request to the Architectural Committee for the erection of a fence. On May 7, 2004, Carrie Selch, a board member of the Association, left a voicemail message for the Ottingers:

> Hi Joe and Brenda, this is Carrie Selch, and I am with R & B Architecture Committee for Ashwood Homeowners and I wanted to apologize for the delay on getting your fence approved. I hope it hasn't held you up any, but everything looks fine so consider yourselves approved. And if you have any other questions you can always call me. . . . Once again, I apologize for the delay, but you guys are good to go. Thanks, bye-bye.

(*Id*. at 305.)

The Ottingers proceeded to build a fence that had bracing or ribbing on the outside. After the fence had been completed, Sawyer complained to the Association that the fence had been constructed in violation of the Covenants. On May 24, 2004, the Association sent the Ottingers a letter approving their request, but providing that bracing or ribbing must be on the inside of the fence. On June 3, 2005, Sawyer filed suit against the Ottingers seeking an injunction and attorneys fees.

DISCUSSION AND DECISION

The Ottingers raise several issues on appeal, which we restate as: (1) whether a voicemail satisfies the writing requirement of the Covenants; (2) whether the writing requirement was waived; (3) whether Sawyer's suit is timely; (4) whether the trial court erred by finding the Association is not estopped from arguing the voicemail was not a final approval; (5) and whether the trial court abused its discretion in awarding attorney fees to Sawyer.

The trial court entered findings of fact and conclusions of law pursuant to Trial Rule 52. Therefore, we will not set aside the trial court's factual findings unless they are clearly erroneous. *Nowels v. Nowels*, 836 N.E.2d 481, 484 (Ind. Ct. App. 2005). We do not reweigh the evidence or reassess witness credibility. *Id*. Rather, we consider the

evidence most favorable to the judgment and the reasonable inferences drawn therefrom. *Id*. However, we review questions of law *de novo*. *Id*.

1. Writing Requirement

Covenants are interpreted in the same manner as contracts. *Howell v. Hawk*, 750 N.E.2d 452, 456 (Ind. Ct. App. 2001). The paramount rule for interpretation of covenants is to give effect to the intent of the parties as determined from the language used. *Id*. at 457. "The language of a covenant must be read in an ordinary or popular, and not in a legal or technical sense, unless the circumstances and context indicate that a different meaning was intended." *Id*. (*quoting* 21 C.J.S. *Covenants* § 5 (1990)). Intent is to be determined as of the time the covenant was made. *Id*.

The trial court found:

> As defined by Black's Law Dictionary, a "writing" is "[t]he expression of ideas by letters visible to the eye." Black's Law Dictionary . . . (Rev. 4th Ed. 1968). An audio voice recording does not meet this definition, thus the [Ottingers] failed to establish that the recorded and transcribed message from Ms. Selch to [the Ottingers] was a writing that would comply with the written approval requirement of the Covenants.

(Appellant's App. at 16.)

The Ottingers claim the trial court's reliance on a Black's Law Dictionary from 1968 is erroneous because the definition is outdated. They argue a voicemail is a writing under the definition provided in the edition of Black's Law Dictionary that is contemporaneous with the Covenants, which were drafted in 1997:

> According to the 6th Edition of Black's Law Dictionary published in 1991 (20 years after the definition relied on by the Court), a "writing" means "handwriting, typewriting, printing, Photostatting, photographing, and every other means of recording upon any tangible thing any form of

> communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof[]" or consists of ". . . words . . . or their equivalent . . . set down by handwriting . . . mechanical or electronic recording, or other form of data compilation."

(Appellant's Br. at 14) (emphases removed).

Appellees note the Sixth Edition of Black's Law Dictionary also states, "In the most general sense of the word, 'writing' denotes a document, whether a manuscript or printed, as opposed to mere spoken words." (Appellee Sawyer's Br. at 11.); *see also* Black's Law Dictionary 1641 (8th ed. 2004) (A writing is "[a]ny intentional recording of words in a visual form."). This definition is in accord with the definitions provided in non-legal dictionaries. *See* Merriam-Webster OnLine, www.m-w.com (defining "writing" as "something written [such as] letters or characters that serve as visible signs of ideas, words, or symbols [or] a letter, note, or notice used to communicate or record"); The American Heritage Dictionary of the English Language (4th ed. 2000), *available at* www.bartleby.com/61 ("Something written, especially . . . [m]eaningful letters or characters that constitute readable matter.").

The Ottingers direct us to statutes and rules that define "writing" to include audio recordings. However, we interpret words in a covenant according to their ordinary meaning rather than specialized legal definitions. *See Howell*, 750 N.E.2d at 457. An unrelated statute does not control the intent of the covenanting parties. While an audio recording does serve to memorialize the statements made, the parties may have their own reasons for preferring written documentation and may bargain specifically for that.

Therefore, the trial court did not err by concluding the voicemail did not satisfy the Covenants' writing requirement.

2. Waiver of Writing Requirement

Alternatively, the Ottingers argue the writing requirement was waived because Selch, a board member, left a voicemail instead of writing a letter. The trial court's order states:

> Indiana law has recently defined waiver as: "Waiver is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it." McGraw v. Marchioli, 812 N.E.2d 1154, 1157 (Ind. Ct. App. 2004) (citation omitted).
>
> * * * * *
>
> [The Ottingers] failed to establish grounds upon which to waive any conditions or requirements of the Covenants.

(Appellant's App. at 13-14, 16.) The Association disputed whether Selch had authority to act on its behalf when she left the voicemail. Even assuming she had authority to act for the Association, the Ottingers have not presented any evidence the writing requirement was a "right" belonging solely to the Association. *See Crum v. AVCO Financial Servs. of Indianapolis, Inc.*, 552 N.E.2d 823, 829 (Ind. Ct. App. 1990) (a condition inserted for the benefit of one party may be waived by that party), *trans. denied*. (*See also* Appellant's App. at 264) (The Covenants state the provisions inure to the benefit of the Association and the owner of any lot.). The Ottingers bore the burden of proving the affirmative defense of waiver. *H & G Ortho, Inc. v. Neodontics Intern., Inc.*, 823 N.E.2d 718, 727-28 (Ind. Ct. App. 2005). The trial court did not err by finding the writing requirement was not waived.

3. Timeliness of Sawyer's Suit

The Ottingers claim Sawyer's suit is time-barred. They rely on Article VI, Section 1 of the Covenants, which states in relevant part:

> No . . . fences . . . shall be . . . erected . . . until the written plans and specifications showing in reasonable detail the nature, kind, shape, height, materials (including color), location and approximate cost of same shall have been submitted to and approved in writing . . . by an Architectural Committee. . . . In the event [the Committee] fails to approve or disapprove such design and location within thirty (30) days after said written plans and specifications have been submitted to it, or if no suit to enjoin the making of such additions, alterations or changes or to force the cessation thereof has been commenced within sixty (60) days of such submission, such approval will be deemed to have been given.

(Appellant's App. at 272.) The Ottingers argue this provision creates a sixty-day statute of limitations for lot owners to enforce the architectural control provisions.

Article VI, Section 1 does not appear to apply when the Committee takes action within thirty days; in that case, the plans need not be "deemed" approved because they have in fact been approved or rejected. Accordingly, the purpose of this provision is apparently to ensure prompt handling of requests for architectural changes. As the Ottingers' plan was approved by the Committee within thirty days, this section of the Covenants does not control.

In addition, Sawyer is not challenging the approval of the Ottingers' plans, but their failure to comply with the conditions stated in the approval letter. Because the voicemail did not satisfy the writing requirement, it was the letter that constituted approval, and the letter contained conditions with which the Ottingers did not comply. Article VI, Section 1 cannot logically be read to limit the time Sawyer had to challenge

the manner in which the Ottingers constructed their fence. Otherwise, a lot owner could submit a plan, wait sixty-one days, and build any type of fence, knowing that other lot owners would not be able to enforce the Covenants. Therefore, Sawyer's suit is not barred by this provision.[1]

4. Estoppel

The Ottingers asserted a claim of "detrimental reliance" against the Association. Because "detrimental reliance" is not an independent cause of action,[2] the trial court addressed it as an element of promissory estoppel or equitable estoppel. The elements of promissory estoppel are: "(1) a promise by the promissor; (2) made with the expectation that the promissee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definitive and substantial nature; and (5) injustice can be avoided only by enforcement of the promise." *Brown v. Branch*, 758 N.E.2d 48, 52 (Ind. 2001). The elements of equitable estoppel are:

> (1) a representation or concealment of material fact; (2) made by a person with knowledge of the fact and with the intention that the other party should act upon it; (3) to a party ignorant of the matter; and (4) which induced the other party to act upon it to his detriment.

Ind. Dep't of Envtl. Mgmt. v. Conrad, 614 N.E.2d 916, 921 (Ind. 1993).

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[1] The Ottingers correctly note the trial court did not set out findings of fact and conclusions of law on this issue. However, the failure to do so is harmless because we can conclude as a matter of law from the language of the Covenants that Article VI, Section 1 does not apply in the manner advocated by the Ottingers.

[2] The Ottingers cite *Short v. Haywood Printing Co., Inc.*, 667 N.E.2d 209 (Ind. Ct. App. 1996), for the proposition that detrimental reliance is a distinct cause of action. However, that decision discusses detrimental reliance as an element of fraud. *Id*. at 213.

The Ottingers assert the trial court's findings are clearly erroneous because the findings state the Ottingers presented "no evidence" concerning "Selch's intent with respect to the content of her message," that she "expected the [Ottingers] to rely upon her statements," or that she "intended to induce [the Ottingers] to begin construction of their fence upon receipt of her message." (Appellant's App. at 14-15.)

These findings suggest the trial court did not consider Selch's own statements in the voicemail as evidence of her intent. However, the findings also negate other elements of promissory and equitable estoppel.[3] The trial court found the Ottingers were aware of the writing requirement and had a convenient means for confirming whether Selch's message was intended as a final approval. These findings are supported by the evidence produced at trial. Selch's statement was not "made to one without knowledge of the facts or a convenient means of ascertaining the true facts," *see Conrad*, 614 N.E.2d at 921, and the Ottingers did not reasonably rely on it. *See Brown*, 758 N.E.2d at 52. Therefore, the trial court did not err by determining the Association was not liable to the Ottingers.[4]

5. Attorney Fees

An award of attorney fees is within the discretion of the trial court, and we review the award for abuse of discretion. *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281,

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[3] Therefore, we need not address the Ottingers' argument that the trial court erroneously excluded an e-mail, which would have served as additional evidence of the Association's intent that the voicemail serve as a final approval. The e-mail was purportedly sent by a board member to Sawyer on June 6, 2004, and could not have impacted the Ottingers' knowledge or the reasonableness of their reliance on the voicemail.

[4] Accordingly, we need not address whether the Covenants authorize an award of attorney fees against the Association.

286-87 (Ind. Ct. App. 2004). "An abuse of discretion occurs when the trial court's award is clearly against the logic and effect of the facts and circumstances before the court." *Id*.

The Covenants permit a person suing to enforce the Covenants to recover attorney fees. Sawyer submitted a billing statement, which itemizes 42.75 hours, but the description of the work was redacted. Sawyer was apparently billed $6487.50 for those hours, to which unexplained amounts were added and subtracted, for a total of $14,136.00. Sawyer also submitted an itemized list of costs totaling $111.00. The trial court awarded Sawyer $14,246.00 in costs and fees without providing any rationale.

The costs were fully itemized and consisted mostly of court costs. The trial court had a clear basis for awarding $111.00 in costs. The record also reflects Sawyer was billed $150.00 per hour for 41.25 hours and $200.00 per hour for 1.5 hours, for a total of $6,487.50. The Ottingers protest the redaction of the description of the work done, but they make no argument that these hours or rates are unreasonable. The hours worked and the rate charged are a common starting point for determining the reasonableness of a fee, *see In re Estate of Inlow*, 735 N.E.2d 240, 257 (Ind. Ct. App. 2000) (describing the lodestar method of calculating reasonable attorney fees), and we cannot say the trial court abused its discretion in awarding fees for 42.75 hours. However, the record and the trial court's order reflect no rationale for the remaining $7,647.50 awarded to Sawyer. Therefore, we conclude the trial court abused its discretion by awarding that amount, and Sawyer's award must be reduced to $6,598.50.

CONCLUSION

The Ottingers did not comply with the Covenants or the written approval, and they did not establish the elements of promissory or equitable estoppel. Therefore, the Ottingers must reconstruct their fence as ordered by the trial court. However, Sawyer did not support her full request for attorney fees, and the award must be reduced to $6,598.50.

Affirmed in part and reversed in part.

RILEY, J., concurs.

KIRSCH, J., dissents, with opinion.

IN THE
COURT OF APPEALS OF INDIANA

BRENDA OTTINGER and JOSEPH OTTINGER,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 29A02-0706-CV-1513
	)	
PATRICIA SAWYER and ASHWOOD I HOMEOWNERS' ASSOCIATION,	)	
	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0506-PL-714

KIRSCH, Judge, *dissenting*.

Do fences make good or bad neighbors? Apparently, in the Ashwood subdivision in Hamilton County, it depends on which way they face.

To me, the trial court's resolution of this dispute between neighbors is a triumph of form over substance, formalism over fairness, and legalism over reasonableness. Accordingly, I respectfully dissent.

Here, the Ottingers did every thing they were required to do by the covenants. Before embarking on construction, they submitted the plans for their fence to the requisite committee. They did not begin construction of the fence until a representative of the committee informed them that their fence had been approved and that they were "good to go." There is nothing in the trial court's findings that suggests that the

information that the committee representative communicated to the Ottingers during her voice mail message was not accurate or authorized. There is no finding, allegation or suggestion that the caller was not a member of the committee or authorized to make the call. There is no finding, allegation or suggestion that the committee had not met and approved the Ottinger fence at the time that the committee member made the call. Similarly, there is no indication whatsoever that the committee's approval was conditional in any way, that it was subject to change, or that the Ottingers should wait for written approval before beginning construction. To the contrary, they were informed that "they were good to go."

It was only after notice of the committee approval of the fence was given to the Ottingers and after they had their fence constructed, that the committee informed the Ottingers that the committee was imposing conditions upon their request. To me, this case is all about reasonableness. Did the Ottingers reasonably rely upon notice of approval of their request to build a fence given by an authorized member of the Architectural Control Committee? I believe the answer is clear and that the Ashwood Homeowners' Association and its members should be promissorily estopped to deny that notice.